

Debra P. Hackett
Clerk, U.S. District Court
15 LEE ST STE 206
MONTGOMERY AL 36104-4055

March 21, 2008

Appeal Number: 07-15885-D
Case Style: Adrian Moultry v. USA
District Court Number: 06-00079 CV-T-N

TO: Debra P. Hackett
CC: Adrian Moultry (11383-002)
CC: Deborah Jean Johnson Rhodes
CC: Donna Barrow Dobbins
CC: Matthew Miner
CC: Administrative File

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.call.uscourts.gov

March 21, 2008

Debra P. Hackett
Clerk, U.S. District Court
15 LEE ST STE 206
MONTGOMERY AL 36104-4055

Appeal Number: 07-15885-D

Case Style: Adrian Moultry v. USA
District Court Number: 06-00079 CV-T-N
SECONDARY CASE NO: 03-00267-CR-T-N

The enclosed certified copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,

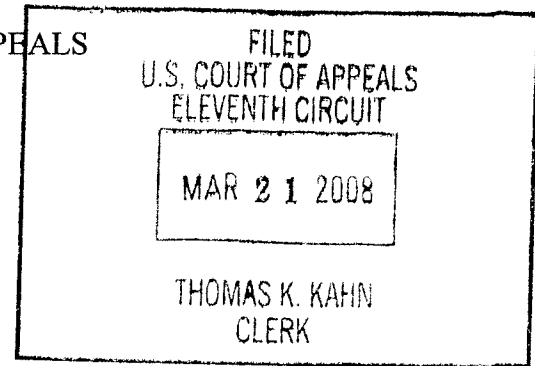
THOMAS K. KAHN, Clerk

Reply To: Nancy Holbrook (404) 335-6183

Encl.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15885-D



ADRIAN MOULTRY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

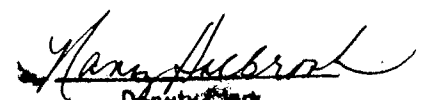
Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Alabama

ORDER:

Appellant moves for a certificate of appealability, as construed from the notice of appeal, and leave to proceed on appeal in forma pauperis, in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion. In his § 2255 motion, appellant claimed that: (1) the harsher penalties for crack cocaine as compared with powder cocaine under the Sentencing Guidelines resulted in an unconstitutional sentence; and (2) his counsel was ineffective for failing to (a) oppose the district court's application of the Armed Career Criminal Act ("ACCA"), (b) timely file a motion to correct

A True Copy - attested:
Clerk, U.S. Court of Appeals,
Eleventh Circuit


Deputy Clerk
Atlanta, Georgia

his sentence under Fed.R.Crim.P. 29 or 35; (c) raise the applicability of various Supreme Court decisions at sentencing, (d) investigate mitigating circumstances for sentencing, and (e) object to the sentencing court's treatment of the Sentencing Guidelines as mandatory. To merit a certificate of appealability, appellant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

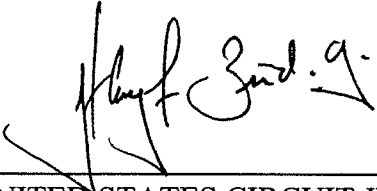
The district court correctly concluded that Claim 1 was precluded by appellant's knowing and voluntary waiver of the right to attack his sentence on direct appeal or collaterally. See United States v. Bascomb, 451 F.3d 1292, 1294 (11th Cir. 2006). With regard to Claims 2(a) through (e), the district court correctly concluded that appellant failed to show deficient performance and prejudice to the outcome of the proceedings. See Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984). Specifically, as to Claim 2(a), appellant failed to show deficient performance or prejudice because he properly was sentenced under the ACCA based on his separate and distinct prior burglary convictions. See United States v. Spears, 443 F.3d 1358, 1360 (11th Cir. 2006). As to Claim 2(b), appellant failed to demonstrate prejudice because Fed.R.Crim.P. 29 does not apply to sentencing and a motion under Fed.R.Crim.P. 35 would have been meritless because appellant properly was sentenced under the ACCA.

In Claim 2(c), appellant argued that counsel was ineffective for failing to raise the applicability of various Supreme Court decisions at sentencing, including Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205

(2005). However, the record reveals that Blakely and Booker were addressed at appellant's sentencing hearing. Moreover, appellant made only conclusory allegations with regard to Apprendi and Almandarez-Torres. See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991). Also, a review of the record reveals that Shepard was not violated in connection with appellant's sentencing. See Shepard, 544 U.S. at 26, 125 S.Ct. at 1263; Taylor v. United States, 495 U.S. 575, 599, 110 S.Ct. 2143, 2158, 109 L.Ed.2d 607 (1990). Finally, in Claim 2(d), appellant made only conclusory allegations, see Tejada, 941 F.2d at 1559, and Claim 2(e) is belied by the record.

Accordingly, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Appellant's motion for leave to proceed on appeal in forma pauperis is DENIED AS MOOT.


UNITED STATES CIRCUIT JUDGE